(3)

No. 94-1930

Supreme Court, U.S.
FILED
JUL 11 1995
CLERK

In The

Supreme Court of the United States

October Term, 1995

THE ASSOCIATION OF NATIONAL ADVERTISERS, INC., GROCERY MANUFACTURERS OF AMERICA, INC., THE SOAP AND DETERGENT ASSOCIATION, NATIONAL FOOD PROCESSORS ASSOCIATION, THE SOCIETY OF THE PLASTICS INDUSTRY, INC., AMERICAN FOREST & PAPER ASSOCIATION, THE AMERICAN ADVERTISING FEDERATION, THE AMERICAN ASSOCIATION OF ADVERTISING AGENCIES, THE CALIFORNIA CHAMBER OF COMMERCE, and THE CHAMBER OF COMMERCE OF THE UNITED STATES,

Petitioners,

vs.

DANIEL LUNGREN, in his official capacity as Attorney General of the State of California, CALIFORNIANS AGAINST WASTE, and the ENVIRONMENTAL DEFENSE FUND,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS CALIFORNIANS AGAINST WASTE AND THE ENVIRONMENTAL DEFENSE FUND

BARBARA J. OLSHANSKY*
Environmental Defense Fund
257 Park Avenue South
New York, New York 10010
(212) 505-2100

* *Counsel of Record for Respondents Californians Against Waste and the Environmental Defense Fund*

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the First Amendment bars a state from establishing threshold standards for the use of certain terms describing the environmental attributes of consumer goods in advertisements for those goods, in order to curtail deceptive and misleading use of such terms and thereby support waste reduction and resource conservation programs.

RULE 29.1 STATEMENT

Pursuant to Rule 29.1 of the Rules of this Court, respondents Californians Against Waste and the Environmental Defense Fund inform the Court that they have no parent companies and no subsidiaries.

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED i

RULE 29.1 STATEMENT ii

TABLE OF AUTHORITIES v

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

A. The Statute 2

B. The Opinions of the Courts Below 3

REASONS FOR DENYING THE WRIT 6

I. THE PETITION PRESENTS NO BASIS FOR THIS COURT'S REVIEW OF THE JUDGMENT OF THE COURT OF APPEALS 6

II. THE COURTS BELOW CORRECTLY RULED THAT SECTION 17508.5 CONSTITUTES A PERMISSIBLE REGULATION OF COMMERCIAL SPEECH 8

A. The Ninth Circuit Properly Found That The Statute Directly Advances California's Interests 8

B. The Ninth Circuit Properly Determined That Section 17508.5 Is Sufficiently Tailored to Meet California's Objectives 15

III. SECTION 17508.5 DOES NOT DISTINGUISH AMONG SPEAKERS ON THE BASIS OF VIEWPOINT 19

CONCLUSION 23

TABLE OF AUTHORITIES

Page

Cases

American Frozen Food Institute v. Mathews, 413 F. Supp. 548 (D.D.C. 1976), *aff'd*, 555 F.2d 1059 (D.C. Cir. 1977) 22

Board of Trustees of the State Univ. of New York v. Fox, 492 U.S. 469 (1989) 4, 15, 16, 17, 19

Bristol-Myers Co. v. F.T.C., 738 F.2d 554 (2d Cir. 1984), *cert. denied*, 469 U.S. 1189 (1985) 22

Burson v. Freeman, 504 U.S. 191 (1992) 15

Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York, 447 U.S. 557 (1980) 4, 5, 8, 9, 14, 17, 22

Edenfield v. Fane, 113 S. Ct. 1792 (1993) 15

Florida Bar v. Went for It, Inc., 63 U.S.L.W. 4644 (U.S. June 21, 1995) 8, 15, 16, 19

Ibanez v. Florida Dept. of Business & Professional Regulation, 114 S. Ct. 2084 (1994) 15

Kraft, Inc. v. F.T.C., 970 F.2d 311 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 1284 (1993) 22

New State Ice Co. v. Liebmann, 285 U.S. 262 (1931) 23

Page

Posadas De Puerto Rico Assoc. v. Tourism Co. of Puerto Rico, 478 U.S. 328 (1986) 19

R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992) 20, 21

Rubin v. Coors Brewing Co., 115 S. Ct. 1585 (1995) 15

Constitutional Provisions

U.S. Const. Amend. I ..... *passim*

U.S. Const. Amend. XIV 2

Statutes

Cal. Bus. & Prof. Code, Section 17508.5 (West Supp. 1995) ..... *passim*

Cal. Pub. Res. Code § 40000 (Deerings 1995) 14

Cal. Pub. Res. Code § 41780(a)(2) (Deerings 1995) 14

21 U.S.C. § 343 (1992) 21

Rules

Federal Rule of Civil Procedure 24(a) 3

Other Authorities

American Enviro Products, Inc., F.T.C. No. C-3376 (March 18, 1992) 13

Page

Archer Daniels Midland Company, F.T.C. No. C-3492 (April 12, 1994) 13

Ex-Cell-O Corp., 82 F.T.C. 36 (1973) 13

G.C. Thorsen, Inc., F.T.C. No. C-3467 (October 8, 1993) ... 13

Jerome Russell Cosmetics, USA, Inc., F.T.C. No. C-3341 (August 21, 1991) 13

21 C.F.R. § 101 (1994) 21

21 C.F.R. § 101.13 (1994) 21

21 C.F.R. § 101.56 (1994) 21

United States Environmental Protection Agency, "Evaluation of Environmental Marketing Terms in the United States (1993) 13

IN THE
Supreme Court of the United States

OCTOBER TERM, 1995

THE ASSOCIATION OF NATIONAL ADVERTISERS, INC., GROCERY MANUFACTURERS OF AMERICA, INC., THE SOAP AND DETERGENT ASSOCIATION, NATIONAL FOOD PROCESSORS ASSOCIATION, THE SOCIETY OF THE PLASTICS INDUSTRY, INC., AMERICAN FOREST & PAPER ASSOCIATION, THE AMERICAN ADVERTISING FEDERATION, THE AMERICAN ASSOCIATION OF ADVERTISING AGENCIES, THE CALIFORNIA CHAMBER OF COMMERCE, and THE CHAMBER OF COMMERCE OF THE UNITED STATES,

Petitioners,

- v. -

DANIEL LUNGREN, in his official capacity as Attorney General of the State of California, CALIFORNIANS AGAINST WASTE, and the ENVIRONMENTAL DEFENSE FUND,

Respondents.

On Petition For A Writ Of Certiorari To
The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS CALIFORNIANS AGAINST WASTE AND THE ENVIRONMENTAL DEFENSE FUND

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The texts of the First Amendment and the Fourteenth Amendment, Section 1, to the United States Constitution and of California Business and Professions Code Section 17508.5 (West Supp. 1995) are set forth in the Appendix to this brief and are listed in the Table of Contents thereto. *See* Res. App., *infra*, 1a-3a.

STATEMENT OF THE CASE

A. The Statute

Section 17508.5 of the California Business and Professions Code establishes objective standards for four environmental terms commonly used in consumer product advertisements: "recycled," "biodegradable," "photodegradable," and "ozone-friendly."[1] The statutory standards apply only to representations in product advertising or on labels made by manufacturers and distributors regarding the environmental attributes of their consumer products.

The definitions established by Section 17508.5 embody minimum qualitative and quantitative standards. Under the statute, a manufacturer wishing to advertise its product as "recycled" must ensure that the product contains at least 10 percent postconsumer content. CAL. BUS. & PROF. CODE § 17508.5(e); Res. App. 3a. Products may be labeled as "ozone-friendly" only if they do not contain any chemicals

---

[1] Respondents have not appealed the district court's ruling that the definition of the fifth term covered by Section 17508.5 -- "recyclable" -- was unconstitutionally vague. Accordingly, this brief will address the scope of the statute as upheld by the courts below.

which migrate to the stratosphere and cause an accelerated depletion of ozone. § 17508.5(a); Res. App. 2a. In order to tout a product as "biodegradable," the manufacturer must ensure that the product will "decompose in the most common environment where the material is disposed within one year through natural biological processes into nontoxic carbonaceous soil, water, or carbon dioxide." § 17508.5(b); Res. App. 2a. A similar definition is delineated for the term "photodegradable"; the product must "decompose in the most common environment where the material is disposed within one year through physical processes, such as exposure to heat and light, into nontoxic carbonaceous soil, water, or carbon dioxide." § 17508.5(c); Res. App. 2a.

B. The Opinions of the Courts Below

In February 1992, petitioners, a consortium of trade, manufacturing, and advertising associations, filed a complaint in federal district court seeking to overturn Section 17508.5. They contended, *inter alia*, that Section 17508.5 violated, on its face, their First Amendment right to free speech.[2] The complaint named respondent Daniel Lungren, the Attorney General of California, as the defendant. Respondents Californians Against Waste and the Environmental Defense Fund intervened as defendants in the district court action pursuant to Rule 24(a) of the Federal Rules of Civil Procedure.

The district court rejected petitioners' First Amendment claim in denying their motion for summary judgment. Pet. App. 34a-59a. The court concluded that Section 17508.5

---

[2] Petitioners also argued below that Section 17508.5 was unconstitutionally vague. With one exception, (*see* note 1, *supra*), the lower courts rejected petitioners' contention. They no longer independently press their remaining vagueness claims in this Court.

regulates only representations made in the commercial context and therefore does not, contrary to petitioners' claim, restrict noncommercial messages. Pet. App. 43a-44a. Nothing in the statute, the district court held, restricts in any way petitioners' right to publish editorial or informational advertisements regarding any environmental issue related to the statutory terms. *Id.* at 43a. "[T]he statute only applies to representations that a specific consumer good possesses a particular environmental attribute." *Id.* at 40a.

Applying this Court's analysis in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557 (1980), the district court further ruled that Section 17508.5 did not amount to an impermissible limitation on commercial speech. According to the court, the State properly asserted a "substantial state interest" in support of Section 17508.5, (Pet. App. 48a), the challenged restriction on commercial speech "directly and materially" advanced that substantial state interest, (Pet. App. 48a-49a), and the state law was "a means narrowly tailored to achieve the desired objective." Pet. App. 50a-53a, *quoting Board of Trustees of the State Univ. of New York v. Fox*, 492 U.S. 469, 480 (1989).

The court of appeals affirmed. Pet. App. 1a-27a.[3] The court concurred with the district court's finding that Section 17508.5 evinced "the California legislature's intent to regulate misrepresentations made in a commercial context exclusively." Pet. App. 11a. The appellate court also upheld the district court's determination that Section 17508.5 survived *Central Hudson* First Amendment scrutiny. Pet. App. 13a-25a. The court rejected petitioners' claim that the record did not support the district court's ruling that the law was "directly and materially" related to the State's

---

[3] Judge Noonan dissented. Pet. App. 28a-33a.

"substantial interests" in protecting consumers from deceptive environmental advertising and conserving natural resources. Pet. App. 18a-22a. The court of appeals found that "the record contains abundant support for the proposition that green marketing boosts consumer demand for the allegedly recycled or biodegradable product," that "most consumers who purchase environmentally-oriented products discovered their alleged ecological attributes from packaging labels," and, that in the absence of Section 17508.5, there had been "numerous instances of advertisers making marketing claims containing misleading or inconsistent uses of the terms regulated by section 17508.5." Pet. App. 17a.

The court determined that Section 17508.5 materially furthers the State's articulated interests in several ways. First, by delineating "objective, and consistently applied standards," it increases the accuracy of claims using the statutory terms, thereby enabling consumers to make more deliberate and informed choices. Pet. App. 18a-19a. Second, the statute's minimum standards permit consumers to select products that provide significant environmental benefits. Pet. App. 18a. Third, the statute reduces the unfair competition resulting from deceptive advertising practices by ensuring that manufacturers making environmental improvements in their products can effectively advertise and "capture the benefits of green labelling." Pet. App. 21a.

Finally, the court of appeals held that Section 17508.5 satisfied *Central Hudson's* requirement that the restriction on commercial speech be "no more extensive than necessary to further the state's interests." Pet. App. 22a, *quoting* 447 U.S. at 569-70. Neither of petitioners' proffered regulatory alternatives, the court concluded, supported their claim that the state law was unduly restrictive. Pet. App. 22a-25a.

REASONS FOR DENYING THE WRIT

I. THE PETITION PRESENTS NO BASIS FOR THIS COURT'S REVIEW OF THE JUDGMENT OF THE COURT OF APPEALS

Respondents Californians Against Waste and the Environmental Defense Fund respectfully urge this Court to deny the Petition for a Writ of Certiorari because this case presents none of the features found in cases warranting this Court's review.

The Ninth Circuit Court of Appeals correctly rejected petitioners' First Amendment challenge to Section 17508.5, and that ruling presents nothing more than a factbound application of this Court's First Amendment precedent regarding state regulation of purely commercial speech. The case raises no fundamental issue regarding the proper First Amendment test to apply to restrictions on consumer product advertising. Nor does the petition present any threshold dispute regarding the commercial nature of the speech that is regulated by California's truth-in-environmental advertising law.

Further, this case does not present a conflict among the circuits mandating a definitive ruling by this Court. No lower court has ruled to the contrary on the narrow issue addressed here, the assessment of a state regulation which establishes standard definitions for technical terms used in consumer product advertising in order to curtail deceptive and misleading claims of environmental benefit.

The absence of any other case law counsels strongly against this Court granting certiorari for another reason as well. States are just now beginning to consider legislative measures, like the state law challenged in this case, designed

to promote environmental protection goals through market forces rather than the kind of command and control regulatory approach that has dominated federal and state environmental laws during the past two decades. With other states poised to decide what form of regulation to adopt to address the same problems as those plaguing California, review by this Court now would be premature.

The California legislature carefully crafted Section 17508.5 to help stem the rising tide of deceptive and misleading environmental advertising claims and to support the State's waste management and resource conservation programs. The law thus represents California's reasoned determination regarding the most appropriate means of addressing the consumer and environmental protection problems currently facing the State and its residents. As the court of appeals appropriately noted, this Court's precedent stresses the need for deference to such determinations. Pet. App. 25a. No risk is created here by such deference because "the California legislature has stayed within constitutional parameters." *Id.* Section 17508.5 imposes a very limited restriction on commercial speech, and has been narrowly tailored to directly and materially advance the State's articulated goals.

In sum, petitioners' challenge presents none of the indicia found in cases warranting a grant of certiorari. Accordingly, the petition should be denied.

II. THE COURTS BELOW CORRECTLY RULED THAT SECTION 17508.5 CONSTITUTES A PERMISSIBLE REGULATION OF COMMERCIAL SPEECH

A. The Ninth Circuit Properly Found That The Statute Directly Advances California's Interests

The court of appeals correctly rejected petitioners' claim that California's environmental advertising law, which regulates the use of certain terms purporting to describe the environmental attributes of consumer goods, violates the First Amendment. The court based its ruling on a straightforward application of this Court's commercial speech precedent, in particular, the analytic framework the Court first set forth in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980) and most recently applied in *Florida Bar v. Went for It, Inc.*, 63 U.S.L.W. 4644, (U.S. June 21, 1995).[4] Petitioners argue, however, that the lower courts misapplied the last two prongs of the *Central Hudson*

---

[4] Petitioners no longer dispute the threshold applicability of the *Central Hudson* framework. In the lower courts, petitioners argued that the state law should be subject to strict scrutiny because it restricted noncommercial speech. The lower courts uniformly rejected that contention, which was based on petitioners' misconstruction of the scope of the state law. *See* Pet. App. 8a-13a, 38a-44a. Petitioners have (wisely) abandoned that claim before this Court. The lower courts, however, also rejected the argument of respondents Californians Against Waste and the Environmental Defense Fund that the kind of commercial speech restricted by Section 17508.5 is "inherently misleading" and therefore not entitled to First Amendment protection at all. *See* Pet. App. 14a-15a, 45a-47a. Should this Court, contrary to respondents' submission, grant the petition in this case, the inherently misleading nature of the speech at issue would provide an alternative basis for affirming the judgment below.

test to the facts of this case.[5] None of their claims possesses merit.

Petitioners' assertion, (Pet. 18), that the statute cannot survive scrutiny because it "is irrational and does not directly advance California's interests to a material degree," is singularly unconvincing. The immediate and material relationship between the State's interests in preventing deceptive environmental advertising and supporting resource conservation efforts and an advertising law that allows consumers to make informed choices about goods based on their environmental attributes, cannot be disputed. By establishing definitional standards for a few select environmental terms, Section 17508.5 provides manufacturers with an economic incentive to make environmental improvements in their products in order to meet the standards if they wish to take advantage of the shorthand informational value of a particular environmental term of art. Pet. App. 21a. This incentive directly furthers California's interest in promoting resource conservation. When manufacturers change their products to meet the statutory standards, the improvements directly accomplish the State's objectives of reducing waste, conserving resources, and bolstering recycling programs. *See Id.*

The statute also provides consumers with more accurate and reliable information regarding their market choices by eliminating the potential for the multiplicity of meanings that has bewildered and misled consumers for years. As the court of appeals appropriately concluded, by eliminating

---

[5]The last two prongs of the *Central Hudson* framework inquire whether the restriction on commercial speech directly advances the substantial state interest asserted, and whether the regulation is more extensive than necessary to serve that interest. *Central Hudson*, 447 U.S. at 566.

inconsistent usage of the covered terms, Section 17508.5 enables consumers to rely reasonably on the accuracy of environmental claims, and "thus make rational product comparisons." Pet. App. 19a. Moreover, the minimum standards embodied in the statutory definitions ensures consumers that products advertised by the defined terms will actually provide real and *significant* environmental benefits. Pet. App. 18a.

Petitioners' insistence that California's law is nonetheless irrational turns this Court's First Amendment precedent on its head. They argue, (Pet. 18-19), that Section 17508.5 is infirm because it bars only those advertisements designed to sell a particular consumer good and not all informational messages that contain generalized descriptions of environmental attributes. The State, however, has done nothing more than exempt from the law's prohibition those expressions of commercial speech that are both more removed from the consumer's immediate purchasing decision and more likely to be commingled with noncommercial messages.[6] Such a state effort to mitigate the effects of the

---

[6] Petitioners argue, (Pet. 19), that the statute is ineffective because, as interpreted by the lower courts, it permits advertisers "to use the regulated terms to say whatever they wish so long as their statements are phrased 'generally' enough." The lower court's opinion, however, contains no such conclusion. For instance, the district court's decision that the statute did not reach the Del Monte Food Company's informational messages regarding the "recyclability" of steel was based squarely upon the statutory language, which plainly limits the statute's coverage to representations about the environmental attributes of *consumer products*. *See* Pet. App. 39a-40a & n.6. As the district court correctly noted, Del Monte's "tin" can message does not constitute a representation concerning the environmental attributes of a particular consumer product and therefore simply does not fall within the ambit of the statute. *Id.*

advertising restriction, by narrowing the law's applicability, does not create a constitutional infirmity. It instead underscores the reasonableness of the law.

Petitioners, in effect, invite this Court to create a constitutional Catch 22. They argued below that the state law was unconstitutional because (they claimed) it prohibited general informational messages that had noncommercial elements. Pet. App. 8a-13a, 38a-44a. But, now that the lower courts have concluded that the law includes no such restriction, petitioners argue here, (Pet. 19), that it violates the First Amendment because it does *not* prohibit those general informational messages. This new twist in petitioners' argument may be interesting, but it is certainly no more persuasive than the argument made to the courts below.

Petitioners' argument that Section 17508.5 fails to advance the State's interests because it does not cover every term that might be used in claims of environmental benefit is similarly unpersuasive. The statute was not enacted as a measure to police every environmental attribute claim; it was intended to regulate several of the terms most commonly abused in environmental advertising. In the absence of uniform definitions, these four terms are merely technical buzzwords, phrases whose meanings are elusive but which the public nevertheless has come to associate in imprecise ways with sound environmental practice. By imbuing these terms with specific meanings and delineating standards for their use, Section 17508.5 clarifies the specific shorthand through which advertisers in the past have conveyed an unlimited number of vague, misleading, and deceptive environmental messages to the public.

Finally, there is no merit to petitioners' claim, (Pet. 20-21), that the State has not met its affirmative burden of showing the direct and material relationship between the

challenged law and the State's substantial interests in consumer protection and environmental conservation. The "entire factual basis" for Section 17508.5 is not, contrary to petitioners' intimation, "'only one instance of one word, cited by a partisan of the statute and unproved in court.'" Pet. 20, *quoting* Pet. App. 30a (Noonan, J., dissenting). Petitioners' claim grossly mischaracterizes the record in this case.

As the court of appeals expressly noted, (Pet. App. 17a-18a), the record is replete with evidence supporting the State's conclusions regarding the existence of, and continuing potential for, deceptive and misleading use of the statutory terms to tout trivial or nonexistent environmental benefits of consumer products. The record offers an extensive and well-documented history of advertisers' inconsistent and misleading use of the very environmental terms covered by Section 17508.5. The record includes, for example, a lengthy report on deceptive environmental advertising issued by a ten-state task force of state attorneys general, (SER 12-83),[7] as well as numerous affidavits, studies, letters, and articles.[8]

---

[7] "SER" refers to respondents' Supplemental Excerpts of Record filed in the court of appeals; "ER" refers to petitioners' Excerpts of Record filed with that court.

[8] *See, e.g.*, SER 84-87 (letter from the Procter & Gamble Company, one of petitioners' members, to the Minnesota Attorney General describing the misleading aspects of biodegradability claims); SER 156-62 (an affidavit from an environmental consulting firm attesting both to the misleading use of the covered terms in California and to consumers' confusion over their meaning); SER 193-204 (a national study completed by Abt Associates Inc., a research and consulting firm, finding that consumers are misinformed about products' environmental attributes due to inconsistent labeling); SER 88-89 (a letter from the California Attorney General to the Governor of California specifying the nature and extent of deceptive environmental

The record also well documents both the substantial consumer interest in purchasing goods that offer the kinds of environmental attributes covered by Section 17508.5, (SER 18-19, 196, 209, 275), and consumers' special needs for guidance because of their inability to evaluate a product's environmental attributes on their own (SER 20, 88, 136-37, 195, 199, 216, 276). Indeed, petitioners' claim regarding the inadequacy of a factual basis for the law is difficult to fathom in light of their own repeated acknowledgement in testimony before government agencies and in the petition itself, (*see* Pet. 17 n.11), of the potential for advertisers to use the

---

advertising). For additional record support, *see* SER 21-22, 60, 92, 158, 227-228; *see also Ex-Cell-O Corp.*, 82 F.T.C. 36 (1973) (order enjoining company from making biodegradability claims regarding plastic-lined milk cartons); *Jerome Russell Cosmetics, USA, Inc.*, F.T.C. No. C-3341 (August 21, 1991) (final consent order enjoining company from representing that its hair spray, which contained ozone depleting chemicals, was "ozone-safe"); *American Enviro Products, Inc.*, F.T.C. No. C-3376 (March 18, 1992) (final consent order enjoining company from making biodegradability claims regarding its disposable diapers); *G.C. Thorsen, Inc.*, F.T.C. No. C-3467 (October 8, 1993) (final consent order enjoining company from representing that its aerosol cleaning products, which contained ozone depleting chemicals, are "ozone friendly"); *Archer Daniels Midland Company*, F.T.C. No. C-3492 (April 12, 1994) (final consent order enjoining company from making biodegradability and landfill benefit claims for plastic products containing a corn starch additive); United States Environmental Protection Agency, "Evaluation of Environmental Marketing Terms in the United States" (1993) (detailing 35 cases brought by state Attorneys General and local Departments of Consumer Affairs against manufacturers for advertising claims that used the terms "degradable," "recycled," and "ozone-friendly" in a deceptive and misleading manner).

environmental terms covered by Section 17508.5 in misleading ways.[9]

Further, the record amply supports the State's conclusion regarding the critical need for waste reduction and resource conservation measures in California. CAL. PUB. RES. CODE § 40000 (Deerings 1995); *see* SER 124-25, 138. Recycling programs are a vital part of the State's effort to reduce the amount of municipal waste that is currently being sent to landfills and incinerators for disposal. *See* CAL. PUB. RES. CODE § 41780(a)(2) (Deerings 1995); SER 125, 148, 158-61. However, as the record shows, markets for the materials collected in such programs have not been adequately developed, and therefore such recovered materials are not diverted from the solid waste stream destined for landfilling or incineration. SER 152, 155. The enhancement of these markets constitutes a critical part of the State's effort to reduce waste, and conserve its dwindling landfill space.

Such a record is more than sufficient under *Central Hudson* and its progeny. This Court's precedent does not

---

[9] For example, petitioner American Forest & Paper Association (formerly The American Paper Institute) stated in its comments on the findings and recommendations of the ten-state attorney general task force on deceptive advertising that:

> [The Association] believes that some form of standardized definitions and guidelines should be developed to *provide meaning* to environmental terms used in product advertising and labeling . . . we believe there is, in all probability, a strong government role required.

SER 7 (emphasis supplied). Other trade associations have voiced similar views. *See e.g.*, ER 70-72.

require "empirical data . . . accompanied by a surfeit of background information." *Florida Bar*, 63 U.S.L.W. at 4647. It is even "sufficient to rely on studies and anecdotes pertaining to different locales altogether." *Id.* Even "simple common sense" can suffice. *Id.*, *quoting Burson v. Freeman*, 504 U.S. 191, 211 (1992). Here, the statute is supported by a host of detailed studies, expert testimony presented to the U.S. Senate and the U.S. Environmental Protection Agency, significant anecdotal evidence, as well as the common sense notion that standardization of a few select terms in consumer advertising promotes consumer understanding and the ability to choose products that meet the required environmental criteria.[10]

B. The Ninth Circuit Properly Determined That Section 17508.5 Is Sufficiently Tailored To Meet California's Objectives

In *Florida Bar*, this Court most recently confirmed that the *Fox* test remains the proper gauge for evaluating the "fit"

---

[10] Petitioners' reliance, (Pet. 18-22), therefore on cases like *Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585 (1995), *Ibanez v. Florida Dept. of Business & Professional Regulation*, 114 S. Ct. 2084 (1994), and *Edenfield v. Fane*, 113 S. Ct. 1792 (1993) is entirely misplaced. The constitutional infirmity in *Coors Brewing Co.* was the law's utterly irrational failure to restrict categories of commercial speech that were more likely to cause harm than the speech the law instead restricted, as well as the law's bizarre requiring of speech that would undermine the restriction's purported purpose. *See* 115 S. Ct. at 1593 ("irrationality of this unique and puzzling regulatory framework ensures that the labeling ban will fail to achieve that end.") No comparable defect infects Section 17508.5. And in both *Edenfield* and *Ibanez*, unlike this case, "the State offered no evidence or anecdotes in support of its restriction...." *Florida Bar*, 63 U.S.L.W. at 4647; *see Ibanez*, 114 S. Ct. at 2090.

between a statute and a state's articulated interests:

> In *Fox*, we made clear that the "least restrictive means" test has no role in the commercial speech context. "What our decisions require," instead, "is a 'fit' between the legislature's ends and the means chosen to accomplish those ends,' a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is 'in proportion to the interest served,' that employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective."

Florida Bar, 63 U.S.L.W. at 4648 (quoting *Fox*, 492 U.S. at 480) (citations omitted). Thus, contrary to petitioners' contention (Pet. 22-23), the court of appeals appropriately relied on *Fox* in reaching its determination that Section 17508.5 is sufficiently tailored to achieve California's consumer protection and environmental conservation goals.

Petitioners here reiterate their claim that there is "no reasonable fit between the statute's means and its asserted ends." Pet. 22. The primary support for this claim is their assertion that the State could have instead served all of the same interests with a law that did not restrict the use of the four environmental terms of art, so long as they were accompanied by qualifying language that explained what the advertiser meant in each specific context. Petitioners further contend that respondent California conceded as much when it acknowledged before the district court that the statute could be so construed. Petitioners' logic is doubly flawed.

First, although the State did contend before the district court that the law could be validly construed to exempt from

its restriction use of the covered terms with qualifying language, the State never stated that such a construction: (1) was *compelled* by the First Amendment; (2) would serve *all* of the same interests as a state advertising regulation lacking such an exemption; and (3) would serve all of the same interests *to the same degree* as a state law without such an exemption. It is certainly a novel theory of First Amendment law to suggest, as petitioners do, that, if a state says that a state law may possibly be read to cover less speech, that is tantamount to a concession that the law would, absent such a construction, violate the First Amendment. Not surprisingly, petitioners do not cite to any case in support of that novel proposition.

Nor, in any event, does the absence of such a statutory exemption cause the law to violate the tenets of *Central Hudson*. The First Amendment does not create a constitutional straitjacket mandating that states opt in favor of requiring more speech rather than restricting some speech. *See Fox*, 492 U.S. at 479. Moreover, as the court of appeals explained, requiring more speech is "not clearly less burdensome than adherence to uniform definitions." Pet. App. 24a.

Petitioners' second "alternative," case-by-case prosecution under the State's general prohibition on false and misleading advertising, is similarly flawed. Such an approach, the court of appeals found, is both "less precise" and "potentially more inhibiting" than Section 17508.5 because the State's general false advertising statutes employ vague standards that provide little guidance to advertisers in comparison to "section 17508.5's numerically exact thresholds." Pet. App. 23a.

Furthermore, neither of the two proffered "alternatives" would have furthered the State's important environmental

objectives. Pet. App. 23a-24a. As the court noted, regulations that rely on disclaimers or qualifying language cannot help to advance California's environmental conservation goals, because they "fail to create the same incentives for environmentally substandard firms to improve the ecological attributes of their products rather than merely harmonize their claims with production and disposal realities."[11] *Id.*

Finally, petitioners also cryptically refer, (Pet. 24), to the possibility of the State's "directly requiring more environmentally sound packaging." This regulatory approach would not address the problem of deceptive advertising using the covered terms. Moreover, such an approach would eliminate both manufacturer and consumer choice and would therefore be much more intrusive in the marketplace.

In sharp contrast, the burden Section 17508.5 imposes is minimal. Under Section 17508.5, the factual information associated with the four technical terms covered by the statute may be communicated freely and explicitly to the public. Advertisers remain free to inform the public through any medium they choose that their products "contain x percent recovered material" or that their products "will decompose in two years under x conditions." *See* Pet. App. 25a. Section 17508.5 simply prevents petitioners from trading on the reservoir of goodwill created by those manufacturers that have made significant environmental improvements in their products and have used the covered terms to advertise those improvements.

---

[11]There is also plainly a cost to exempting advertisements with qualifying language. As such qualifications persist, the informational significance of the term of art, standing alone, necessarily diminishes.

To be sure, as the court of appeals explained, (Pet. App. 25a), there is "inevitably a degree of arbitrariness in the legislative determination of where along the continuum of recycled content percentages or decomposition timetables a product becomes 'recycled' or 'biodegradable." But, as described by the court below, this Court's precedent, especially, *Fox* and *Posadas De Puerto Rico Assoc. v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986), "leave scant judicial latitude to disturb such legislative determinations where, as here, the thresholds drawn do not appear unduly prohibitive and leave considerable room for both more privileged editorial commentary and, in the commercial context, alternative expressions conveying perfectly well information about the modest environmental attributes of products not measuring up" to the standards of the statute. Pet. App. 25a; *see Florida Bar*, 63 U.S.L.W. at 4648 (fit between legislative ends and means need only be "reasonable" and neither "necessarily perfect" nor "necessarily the single best disposition").

III. SECTION 17508.5 DOES NOT DISTINGUISH AMONG SPEAKERS ON THE BASIS OF VIEWPOINT

Having failed before the lower courts to overturn Section 17508.5 on the ground that it unconstitutionally infringes upon their "noncommercial" expression, petitioners now contend, (Pet. 25-27), that the statute violates the First Amendment because it discriminates among speakers on the basis of viewpoint. Unfortunately, this last ditch effort is also unavailing. Neither the statutory language nor the decisional authority support petitioners' theory. No such discrimination exists.

Section 17508.5 in no manner distinguishes between "for profit" and "not-for-profit" speakers. The statute

provides that "it is unlawful for *any person*" to advertise the environmental attributes of their consumer products using the covered terms unless those products meet the definitional requirements. The phrase "any person" makes clear that the statute applies equally to "for profit" and "not-for-profit" sellers that make claims regarding the environmental benefits of their consumer products. Hence, under the statute's plain terms, the same definitional requirements would apply to a "recycled" content claim made by Weyerhauser about one of its paper products, as to a similar claim made by respondent Environmental Defense Fund about its wildlife calendars.

For similar reasons, petitioners' contrasting, (Pet. 26), of the effect of the statutory standards on a manufacturer's use of the covered terms in consumer product advertising with an environmental organization's use of the terms in a discussion of public policy is wholly unavailing. The appropriate comparison is the effect of the statute on an environmental organization's use of the relevant terms in a discussion of public policy with the effect of the statute on any of petitioners' efforts to use those same terms in their own discussion of public policies. And what such a comparison demonstrates is the absence of any viewpoint discrimination; Section 17508.5 imposes absolutely no restriction on either speaker's noncommercial messages, regardless of the viewpoints being expressed. As the court of appeals explained, "a firm can editorialize about the environment, lambast the statute or laud recycling without advertising or otherwise making commercial representations about one of its products." Pet. App. 12a.

Petitioners' reliance, (Pet. 25-27), on this Court's ruling in *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538 (1992), to support their theory is misguided. Not only did that law restrict noncommercial speech, but it decidedly favored one set of speakers over another: "those arguing in favor of racial,

color, etc. tolerance and equality" over those expressing the opposing point of view. *Id.* at 2548.

Petitioners acknowledge, by omission, that the lower court's ruling does not conflict with the decision of any other court of appeals. Indeed, this case represents the first challenge to a state's effort to establish threshold standards for terms used in the environmental marketing of consumer products.

To be sure, federal and state governments have long imposed analogous restrictions on advertisers. Nutritional claims, for example, present the same concerns as those raised by environmental marketing claims: the complex technical and scientific issues underlying these types of claims greatly limit the ability of consumers to assess their accuracy and significance. For this reason, the federal government has adopted numerous regulations that establish standards for the use of terms describing a product's nutritional attributes. *See* Federal Food, Drug and Cosmetic Act, as amended by the Nutrition Labeling and Education Act of 1990, 21 U.S.C. § 343 (1992); 21 C.F.R. § 101 (1994).[12]

---

[12] The Nutrition Labeling and Education Act and implementing regulations require manufacturers that make nutritional claims about food products to meet strict definitional standards. The definitions set by the Food and Drug Administration pursuant to the Act set baseline requirements, and specify content, ingredient percentages, and measuring techniques for certain key descriptive phrases. For example, the term "sodium free" may only be used in the labeling of food that contains "less than 5 milligrams of sodium per serving" and the term "low sodium" may only be used in reference to food that contain "140 milligrams of less of sodium per serving." 21 C.F.R. § 101.13 (1994). Similarly, "light" or "lite" claims can only be used to advertise a product if the food "derives less than 50 percent of its calories from fat." 21 C.F.R. § 101.56 (1994).

The lower courts have uniformly upheld those regulations against First Amendment challenges.[13] Hence, to the extent that there is any relevant lower court precedent, it is consistent with the court of appeals decision in this case and provides no basis for this Court's review.

Stripped of its exaggerated rhetoric, therefore, the petition merely presents a factbound application of *Central Hudson* in the first challenge to a state restriction on environmental advertising; a challenge brought at a time when, as petitioners acknowledge, there is only a "paucity of newly introduced state environmental laws." Pet. 14.

This fact points to another weighty reason why this Court should be especially wary of subjecting the state law at issue in this case to premature Supreme Court review. States are just now beginning to experiment with the possibility of enacting these kinds of free market environmental laws.[14]

---

[13] *See, e.g., Kraft, Inc. v. F.T.C.*, 970 F.2d 311, 324-26 (7th Cir. 1992) (upholding Federal Trade Commission ban on deceptive claims about the calcium content of processed cheese products), *cert. denied*, 113 S. Ct. 1284 (1993); *Bristol-Myers Co. v. F.T.C.*, 738 F.2d 554, 562 (2d Cir. 1984) (sustaining FTC prohibition against certain advertising claims for analgesics), *cert. denied*, 469 U.S. 1189 (1985); *United States v. General Nutrition, Inc.*, 638 F.Supp. 556, 562 (W.D.N.Y. 1986) (upholding Food and Drug Administration prohibition of certain types of nutritional claims on product labels); *American Frozen Food Institute v. Mathews*, 413 F. Supp, 548 (D.D.C. 1976) *aff'd*, 555 F.2d 1059 (D.C. Cir. 1977) (court upheld FDA regulations requiring certain foods to meet specific quality standards before using certain terminology on the label).

[14] Indeed, even in California, there is continuing debate about the appropriate form environmental advertising regulations should take. On May 23, 1995, the California State Senate passed SB

The states should be encouraged to do so because of the clear value of such experimentation. *See New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1931) (Brandeis, J., dissenting).

CONCLUSION

For the foregoing reasons, this Court should deny the Petition for a Writ of Certiorari.

Dated: New York, New York
July 11, 1995

Respectfully submitted,

Barbara J. Olshansky*
Environmental Defense Fund
257 Park Avenue South
New York, New York 10010
Telephone: (212) 505-2100

**Counsel of Record for Respondents Californians Against Waste and the Environmental Defense Fund*

426, a bill that would repeal Section 17508.5 and replace it with regulations that incorporate the Federal Trade Commission Guides for the Use of Environmental Marketing Claims.

APPENDIX

TABLE OF CONTENTS

APPENDIX

Page

United States Constitution, Amendment I 1a

United States Constitution, Amendment XIV, Section 1 .. 1a

California Business and Professions Code, § 17508.5 (West 1995) 1a

United States Constitution

Amendment I

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment XIV, Section 1

> **Section 1.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

California Business and Professions Code

> **§ 17508.5 Environmental representations relating to consumer goods**
>
> It is unlawful for any person to represent that any consumer good which it manufactures or distributes is "ozone friendly," or any like term which connotes that stratospheric ozone is not being depleted, "biodegradable,"

"photodegradable," "recyclable," or "recycled" unless that consumer good meets the definitions contained in this section, or meets definitions established in trade rules adopted by the Federal Trade Commission. For the purposes of this section, the following words have the following meanings:

(a) "Ozone friendly," or any like term which connotes that stratospheric ozone is not being depleted, means that any chemical or material released into the environment as a result of the use or production of a product, will not migrate to the stratosphere and cause unnatural and accelerated deterioration of ozone.

(b) "Biodegradable" means that a material has the proven capability to decompose in the most common environment where the material is disposed within one year through natural biological processes into nontoxic carbonaceous soil, water, or carbon dioxide.

(c) "Photodegradable" means that a material has the proven capability to decompose in the most common environment where the material is disposed within one year through physical processes, such as exposure to heat and light, into nontoxic carbonaceous soil, water, or carbon dioxide.

(d) "Recyclable" means that an article can be conveniently recycled, as defined in Section 40180 of the Public Resources Code, in every

county in California with a population over 300,000 persons. For the purposes of this subdivision, "conveniently recycled" shall not mean that a consumer good may be recycled in a convenience zone as defined in Section 14509.4 of the Public Resources Code.

(e) "Recycled" means that an article's contents contain at least 10 percent, by weight, postconsumer material, as defined in subdivision (b) of Section 12200 of the Public Contract Code.

(f) "Consumer Good" means any article which is used or bought for use primarily for personal, family, or household purposes.

(g) For the purposes of this section, a wholesaler or retailer who does not initiate a representation by advertising or by placing the representation on a package shall not be deemed to have made the representation.